approximately the past 18 years, the FCC has interpreted the Pole Attachments Act as applying to distribution facilities only.[33/] This interpretation is consistent with the plain language of the statute and the prevailing understanding within the electric utility, cable and telecommunications industries that the term "poles" means distribution poles only. Congress did not change the language of the statute with its 1996 Act amendments. Accordingly, the Commission should correct its finding on the issue and specifically interpret the Pole Attachments Act to exclude transmission facilities.

C. The Use of Any Single Piece of Infrastructure for Wire Communications Does Not Trigger Access to All Other Infrastructure

22. The Infrastructure Owners dispute the FCC's position, supported in Oppositions in this proceeding,[34/] that a grant of access to part of a utility's infrastructure extends of the requirement of access to the entire infrastructure.[35/] The FCC does not obtain jurisdiction over utility infrastructure except to the extent that it is designated or used, whether it be in whole or in part, for communications purposes. The FCC's and the parties' position is at odds with Congressional intent.

23. Equally flawed is the FCC's position, supported by certain of the parties, that a utility's use of its

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[33/] See, e.g., In the Matter of Capital Cities Cable, Inc. v. Mountain States Tel. and Tel. Co., 56 Rad. Reg. 2d (P&F) 393, 399 n.10 (1984); In the Matter of Logan Cablevision, Inc. v. Chesapeake and Potomac Tel. Co. of West Virginia, 1984 FCC Lexis 2400 (1984).

[34/] See AirTouch Comments at 23; AT&T Opposition at 36-37.

[35/] Infrastructure Owners's Petition at 40-45.

infrastructure for internal communications purposes subjects it generally to the nondiscriminatory access provisions of the 1996 Act.[35/] This position goes well beyond Congressional intent in enacting the 1996 Act. A utility that is not itself engaged in wire communications, other than for internal communications, is not subject to the access requirements. This is so despite the likelihood that such access would be useful to cable or telecommunications carriers in competing in their respective markets. The FCC's position to the contrary is not supported by the 1996 Act and should be rescinded.

IV. Clarification of the Sixty-Day Advance Notice Requirement Will Avoid Litigation of the Issue

24. Several parties oppose the Infrastructure Owners's request for clarification of the Commission's 60-day notice requirement.[37/] AT&T asserts that the FCC's 60-day notice requirement properly balances the interests of incumbent utilities and competitive LECs.[38/] NCTA asserts that there is no justification for providing less than 60 days' notice of alterations or modification.[39/] Continental Cablevision et al. assert that the 60-day notice period is a common period for joint coordination of projects requiring facilities modification and represents a reasonable compromise.[40/]

[36/] See, e.g., AirTouch Comments at 23.

[37/] Infrastructure Owners' Petition at 45-48.

[38/] AT&T Opposition at 40.

[39/] NCTA Opposition at 31.

[40/] Continental Cablevision et al. Opposition at 14-15.

25. The Infrastructure Owners do not necessarily disagree. They simply request that the rule be clarified to provide that reasonable efforts to provide 60 days advance notice of non-routine, non-emergency modifications constitute compliance. The Infrastructure Owners's position is an attempt to provide some flexibility to meet a myriad of diverse circumstances, thereby avoiding needless, costly litigation. This position is consistent with the FCC's approach in other areas.[41/]

V. Reconsideration Is Not Warranted Because the FCC's Decision Is Correct

A. The Commission Properly Found that States Need Not Certify that They Regulate Matters of Access

26. NCTA and the California Cable Television Association ("CCTA") urge the FCC to require States to certify that they regulate matters of access. They further assert that the states must regulate access in a manner consistent with the Pole Attachments Act and the FCC's First R&O.[42/] These arguments are wholly without textual basis in the 1996 Act and, as a matter of law, are incorrect: Section 224 does not provide for, nor does the Commission have authority to require, State certification of access matters. Similarly, the FCC has no authority to establish a federal policy on access which the states must follow.

27. Congress has spoken to this precise issue. States need not certify on access matters; to the contrary, such a requirement is conspicuously absent from Section 224, in contrast to the express requirement that States certify that they regulate

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[41/] See, e.g., First R&O, ¶ 1159.

[42/] NCTA Opposition at 31-32; CCTA Opposition to Petitions for Reconsideration and Clarification ("CCTA Opposition") at 5-6.

the rates, terms and conditions of pole attachments.[43] The Commission properly followed the plain language of the statute, finding that the amendments to the reverse preemption scheme enacted as part of the 1996 Act do not require the States to certify as to matters of access. The Commission's proper determination should not be disturbed.

28. NCTA and CCTA also assert that the States must regulate access in a manner consistent with the federal law.[44] However, the FCC has no jurisdiction "in any case where such matters are regulated by a State."[45] Thus, once a State has preempted the FCC's jurisdiction, the FCC has no further statutory authority to review the State's access rules or regulations to ensure conformity with the federal rules and regulations. The FCC properly found that it has no authority to establish a nationwide policy on access decisions, or to require States that have preempted its jurisdiction on access matters to conform their rules and regulations to the federal law.[46] NCTA's and CCTA's Oppositions are meritless.

B. Neither the FCC Nor A Party Can Expand the Scope of the Pole Attachments Act to Encompass a Right of Access to Roofs and Risers

29. WinStar reasserts in its Opposition, as it did in its Reconsideration Petition, that "access to roofs and related riser is, by definition, access to the critical right of way for local

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[43] 47 U.S.C. § 224(c)(2).

[44] NCTA Opposition at 32; CCTA Opposition at 6.

[45] 47 U.S.C. § 224(c)(1).

[46] First R&O, ¶ 1238.

exchange carriers such as WinStar..."[47] Specifically, WinStar contends that the 1996 Act provides it with a right of access to "utility roofs."[48] WinStar explains that "it is not seeking access to every piece of equipment or real property owned or controlled by the utility," but instead "is seeking access to legitimate rights of way that will be effective in enabling wireless local exchange carriers to expand their local exchange distribution networks."[49]

30. The apparent basis for WinStar's contention that "utility roofs" are rights-of-way under the 1996 Act is that (1) LECs and utilities maintain microwave and wireline networks used for telecommunications purposes, (2) such LECs and utilities are free to site microwave facilities upon their roofs, whether they choose to do so or not,[50] and (3) denying WinStar access to utility roofs would unreasonably restrict its ability to compete with LECs and utilities that have the option of siting wireless facilities on their roofs.[51] In essence, WinStar's reasoning appears to be that, because rooftops might be useful or "effective"[52] to a telecommunications carrier in expanding its

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[47] WinStar Opposition at 6.

[48] Id. at 7.

[49] Id. at 9.

[50] Id.

[51] WinStar at 7-8.

[52] Id. at 9.

distribution network, rooftops are rights-of-way under Section 224. The FCC properly rejected this position.[53/]

31. Both the plain language and the legislative history of the statute undermine WinStar's position.[54/] The rights conferred by Section 224 extend only to "poles, ducts, conduits and rights of way." The term "rights of way" has historically referred to a right of passage over land owned by another.[55/] Where Congress intended to reach "property," as distinguished from "rights-of-way," it expressly indicated its intention to do so.[56/]

32. Section 224 does not provide for access to a utility's actual or potential "distribution network," as WinStar appears to be contending,[57/] except insofar as the network consists of the listed items. Under WinStar's reasoning, if a utility's property could be used by the utility to site wireless equipment, and if such siting would be "effective in enabling wireless local exchange carriers to expand their local exchange networks,"[58/] that property is a "right of way" for purposes of Section 224.

[53/] First R&O, ¶ 1185.

[54/] See Infrastructure Owners' Opposition to Petition for Clarification or Reconsideration of WinStar Communications, Inc. at 4-9.

[55/] See, e.g., Black's Law Dictionary (Abridged Fifth Edition 1983) at 689: "The term [right of way] sometimes is used to describe a right belonging to a party to pass over land of another . . . ."

[56/] See, e.g., Section 704 of the 1996 Act, codified at 47 U.S.C. § 332(c).

[57/] WinStar Opposition at 7.

[58/] Winstar Opposition at 9.

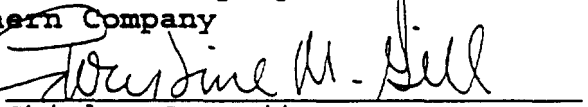
Carried to its logical conclusion, WinStar's argument would permit a telecommunications carrier to site its facilities in the lobby of a utility's headquarters, a location potentially available to the utility, if it would be "effective" to the carrier in expanding its network. Section 224 does not go that far in according access to telecommunications carriers, but instead clearly circumscribes the extent of access. Because WinStar's contrary interpretation of Section 224 constitutes an unwarranted expansion of the rights of access conferred by Congress, it must be rejected.

Conclusion

WHEREFORE, THE PREMISES CONSIDERED, American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Northern States Power Company, and The Southern Company urge the Commission to deny those Oppositions to Petitions for Reconsideration inconsistent with the views expressed herein.

Respectfully submitted,

American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Northern States Power Company and The Southern Company

By 

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Dated: November 12, 1996

CERTIFICATE OF SERVICE

I hereby Certify that on this 12th day of November 1996, I caused true and correct copies of the Reply to Oppositions to Petitions for Reconsideration of the First Report and Order of American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Northern States Power Company, and The Southern Company to be served via First-Class Mail postage prepaid on:

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

To: The Commission

PETITION FOR RECONSIDERATION AND/OR CLARIFICATION OF THE FIRST REPORT AND ORDER

ON BEHALF OF

AMERICAN ELECTRIC POWER SERVICE CORPORATION, COMMONWEALTH EDISON COMPANY, DUKE POWER COMPANY, ENTERGY SERVICES, INC., NORTHERN STATES POWER COMPANY, THE SOUTHERN COMPANY AND WISCONSIN ELECTRIC POWER COMPANY

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Dated: September 30, 1996

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EXECUTIVE SUMMARY

In its First Report and Order the Commission found that Section 224 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, mandates access to utilities' poles, ducts, conduits and rights-of-way on a nondiscriminatory basis and established five "rules of general applicability" and several "guidelines" regulating that nondiscriminatory access. The Commission also promulgated rules to implement the newly enacted written notification provision of Section 224.

The Infrastructure Owners, a group of electric utilities with infrastructure networks constructed and maintained for the purpose of providing electric service, take exception to a number of the Commission's "rules" and "guidelines" and seek reconsideration of them. The defects in the Commission's findings fall into three broad categories.

First, the Commission exceeded its statutory authority under Section 224 in several respects. The Commission went well beyond the scope of the statute in requiring utilities to expand the capacity of their existing infrastructure to accommodate new requests for access by telecommunications carriers or cable operators; indeed, its decision ignores one of the four express bases on which access to infrastructure may be denied. In addition, the Commission's finding that utilities must permit the use of reserve electric space until an actual need develops goes beyond the Commission's province, ignores the realities of electric operations, and threatens the public interest. Finally,

the Commission has impermissibly intruded -- without a statutory basis therefor -- in matters of state jurisdiction in finding that utilities should use eminent domain authority granted under state law to expand their rights-of-way for the benefit of non-electric third parties.

Second, some portions of the Commission's decision are arbitrary and capricious. The Commission adopted a 45-day response requirement without ever noticing the issue and without any mention of it in the Commission's decision. Similarly, the modification costs issue was not noticed. Several other aspects of the Commission's decision are arbitrary and capricious because record support for them is lacking.

Third and finally, the Commission's decision embraces a construction of Section 224 that impermissibly violates Congressional intent in several respects. The requirement that rates, terms and conditions of access be uniformly applied effectively emasculates the Congressional intent -- illustrated both in the express language of the statute and in its legislative history -- in favor of negotiated access agreements. The agency's finding including transmission facilities in the scope of Section 224 and allowing for the placement of equipment other than coaxial or fiber cable on or in utilities' infrastructure also contradicts the express language of the statute and, therefore, Congressional intent.

In addition to those aspects of the First Report and Order on which they seek reconsideration, the Infrastructure Owners

also seek clarification of two ambiguous aspects of the Commission's decision. Specifically, the Commission should clarify that the 60 day written notice period will not apply in instances (of a non-emergency or non-routine nature) where the utility itself does not have the discretion to delay 60 days before undertaking the modification or alteration -- because it is either subject to a state or local requirement or because the public interest dictates that the modification be performed more quickly. The Commission also should clarify that it intends to permit a respondent to an access dispute to file a response to a complaint, and that the Commission will consider that response, before the Commission acts upon the complaint.

In sum, the Infrastructure Owners support the Commission's efforts to implement rules and regulations that further the de-regulatory and pro-competitive policies of the Telecommunications Act of 1996. The Infrastructure Owners' requests for reconsideration and clarification are consistent with those policies and should be adopted by the Commission.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	**CC Docket No. 96-98**
	)	
	)	

To: The Commission

PETITION FOR RECONSIDERATION AND/OR CLARIFICATION OF THE FIRST REPORT AND ORDER

ON BEHALF OF

AMERICAN ELECTRIC POWER SERVICE CORPORATION, COMMONWEALTH EDISON COMPANY, DUKE POWER COMPANY, ENTERGY SERVICES, INC., NORTHERN STATES POWER COMPANY, THE SOUTHERN COMPANY AND WISCONSIN ELECTRIC POWER COMPANY

American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Northern States Power Company, The Southern Company, and Wisconsin Electric Power Company (collectively referred to as the "Infrastructure Owners"), through their undersigned counsel and pursuant to Section 1.429 of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission") submit this Petition for Reconsideration and/or Clarification of the First Report and Order, CC Docket No. 96-98, released August 8,

1996 (hereinafter "First R&O"), in the above-captioned proceeding.[1/]

INTRODUCTION

1. The Infrastructure Owners are investor-owned electric or power utilities (or parents, subsidiaries or affiliates of electric or power utilities) engaged in the generation, transmission, distribution, and sale of electric energy.[2/] The Infrastructure Owners own electric energy distribution systems that include millions of distribution poles and thousands of miles of conduits, ducts and rights-of-way, all of which are used to provide electric power service to millions of residential and business customers. To the extent those facilities are used for communications and the state in question has not preempted the FCC's jurisdiction, the Infrastructure Owners are subject to regulation by the Commission under the federal Pole Attachments Act, 47 U.S.C. § 224, as amended.[3/] The Infrastructure Owners have a vital interest in, and are directly affected by, those

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[1/] First R&O, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, released August 8, 1996, 61 Fed. Reg. 45,476 (Aug. 29, 1996).

[2/] A general description of each of the Infrastructure Owners is attached hereto as Appendix I.

[3/] Some of the Infrastructure Owners provide energy service in states that have preempted the Commission's jurisdiction under Section 224 by making the certification required by 47 U.S.C. § 224(c)(2), and are therefore subject to state regulation of pole attachments. Nonetheless, because the federal statute serves as the loose "benchmark" on pole attachment and related issues, all of the Infrastructure Owners have a significant interest in the Commission's actions concerning such issues.

portions of the Commission's First R&O addressing Section 224(f), access and denial of access to poles, ducts, conduits and rights-of-way, and Section 224(h), written notification of intended modifications to poles, ducts, conduits and rights-of-way.[1/]

2. In general, the Infrastructure Owners seek reconsideration of the Commission's First R&O in the above-captioned proceeding for the following reasons:

- The FCC's requirement that utilities expand capacity to accommodate requests for access is in excess of its statutory authority and is otherwise an impermissible construction of the Pole Attachments Act;
- The FCC's requirement that a utility allow the use of its reserve space until it has an actual need for the space is in excess of its statutory authority and is otherwise an impermissible construction of the Pole Attachments Act;
- The FCC's requirement that electric utilities exercise their powers of eminent domain to expand capacity for third party telecommunications carriers is in excess of its statutory authority and is otherwise an impermissible construction of the statute;
- The FCC failed to provide sufficient notice of agency action in requiring that access to poles be granted within 45 days of a request for access;

[1/] The Commission's discussion of these issues is found in ¶s 1119-1240 of the First R&O.

- The FCC's suggestion that other than wireline equipment can be placed on a utility's infrastructure is an impermissible construction of the Pole Attachments Act;

- The FCC's determination that a utility may not restrict access to infrastructure to its own highly skilled and trained employees is arbitrary and capricious;

- The Commission improperly promulgated rules implementing Section 224(i) of the Pole Attachments Act in a rulemaking relating to Section 224(h);

- The FCC violated the express language of the Pole Attachments Act in requiring uniform application of the rates, terms and conditions of access because that requirement fails to give effect to the statutory provision for voluntary negotiations, which are not limited by the requirements of the Pole Attachments Act;

- The FCC violated the express language of the Pole Attachments Act in finding that transmission facilities are subject to access; and,

- The FCC violated the plain language of the Pole Attachments Act to the extent it concluded that the use of any single piece of infrastructure for wire communications triggers access to all other infrastructure.

3. In addition, clarification is sought by the Infrastructure Owners with respect to the following issues since the intent of the Commission is unclear from its decision:

- That only reasonable efforts are required to provide 60 days advance notice of non-routine or non-emergency modifications; and,

- That the procedures for resolution of access complaints include full consideration of the position of both the complainant and the respondent.

4. In their Comments and Reply Comments in the rulemaking proceedings below,[3/] the Infrastructure Owners also asserted that, to the extent the Commission interpreted Section 224(f) as mandating access to utilities' poles, ducts, conduits and rights-of-way, the statute raises constitutional takings questions. Although the Commission held that Section 224(f)(1) does, in fact, mandate access to utilities' poles, ducts, conduits and rights-of-way, unless one of the exceptions provided in Section 224(f)(2) for denial of access is applicable, see, e.g., First R&O, ¶ 1187, it declined to address the constitutionality of mandated access, finding that it did not have jurisdiction to decide the constitutionality of a federal statute. Id. Because the FCC has already acknowledged its lack of jurisdiction to address the constitutionality of mandated access, the Infrastructure Owners have not argued that question here. The failure to argue the issue should not, however, be interpreted as an admission on the part of the Infrastructure Owners that

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3/ Notice of Proposed Rulemaking, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, released April 19, 1996) ("NPRM").

Section 224(f)(1) is constitutionally firm; nor should the omission to argue the issue be construed as a waiver of any right to challenge the constitutionality of Section 224(f)(1) in any other proceeding or forum.[6/] Further, the Infrastructure Owners submit that the FCC exceeded its statutory authority in construing Section 224(f)(1) as mandating access to utilities' poles, ducts, conduits, and rights-of-way. See, e.g., 24 F.3d 1141 (D.C. Cir. 1994) (statutes should be construed to defeat administrative orders that raise substantial constitutional questions).[7/]

5. The above-referenced aspects of the Commission's First R&O, if allowed to stand, will have direct, adverse impacts on the Infrastructure Owners. For this reason and in light of their participation in the rulemaking proceedings below, the

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[6/] The Commission's statement that a "utility's obligation to permit access under section 224(f) does not depend upon the execution of a formal written attachment agreement with the party seeking access," First R&O, ¶ 1160, further supports the constitutional taking argument. The permanent physical occupation of a utility's infrastructure without any type of an agreement as to the terms and conditions of access (especially an allocation of risk and liability) constitutes a gross invasion of private property. Such an invasion is a taking without regard to the public interest involved. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982). The Infrastructure Owners seek reconsideration and rescission of the Commission's finding that a written agreement is not required before the access obligation is triggered; the Commission should find that access may not be granted to a utility's infrastructure absent a binding agreement setting forth the rates, terms and conditions of access.

[7/] Wisconsin Electric Power Company does not join in the constitutional argument.

Infrastructure Owners have standing to seek reconsideration and clarification of the First R&O, as fully discussed herein.[8/]

ARGUMENT

I. Applicable Legal Standards

6. An agency construing a statute should be mindful of the two-step inquiry set forth by the Supreme Court.[9/] The first step is to determine if Congress has directly spoken to the issue. If the intent of Congress is clear, either from the language of the statute itself or from the use of "traditional tools of statutory construction," an agency, like a reviewing court, must give effect to the unambiguously expressed will of Congress.[10/] Furthermore, courts require that an agency adequately articulate the reasons underlying its construction of a statute so that a reviewing court can properly perform the analysis set forth in Chevron.[11/]

7. In the sections that follow, the Infrastructure Owners demonstrate that the Commission has failed to follow these well-settled principles of statutory construction in a number of

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8/ See Panhandle Eastern Pipeline Co., 4 FCC Rcd 8087, 8088 (1989).

9/ Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984).

10/ ACLU v. Federal Communications Comm'n, 823 F.2d 1554, 1568 (D.C. Cir. 1987) (citing Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985)).

11/ See Acme Die Casting v. NLRB, 26 F.3d 162, 166 (D.C. Cir. 1994); Leeco v. Hays, 965 F.2d 1081, 1085 (D.C. Cir. 1992) ("In the absence of any explanation justifying [the agency's position] as within the purposes of the act . . . , we are unable to sustain the Commission's decision as reasonably defensible.")

instances in promulgating rules to implement new Sections 224(f) and 224(h) of the Pole Attachments Act. Accordingly, the Commission must use the process of reconsideration and clarification to correct clear errors in its decision.

II. Reconsideration Is Mandated Because the Commission Exceeded Its Statutory Authority

A. The Commission Exceeded Its Statutory Authority in Requiring that Utilities Expand Capacity to Accommodate Requests For Access

8. The Commission's determination that utilities must expand capacity to accommodate requests for access is contrary to the express intent of Congress. In the First R&O, the Commission reasoned that because "[a] utility is able to take the steps necessary to expand capacity if its own needs require such expansion[,] [t]he principle of nondiscrimination established by Section 224(f)(1) requires that [a utility] do likewise for telecommunications carriers and cable operators."[12/] Based on this reasoning, the Commission determined that "lack of capacity on a particular facility does not automatically entitle a utility to deny a request for access," and therefore "before a utility can deny access it must explore all accommodations in good faith."[13/]

9. The Commission's interpretation of the nondiscrimination provision fails to give effect to the limitations set forth in Section 224(f)(2). The plain language

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12/ First R&O, ¶ 1162.

13/ Id.

of Section 224(f)(2) clearly gives a utility the right to deny access based on insufficient capacity. Section 224(f)(2) states:

> Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

The only qualification that Congress included in this section is that any denial of access due to insufficient capacity must be done on a "nondiscriminatory basis." This language is unambiguous and, as such, lends itself to only one interpretation. An electric utility has the right to deny access if it determines that there is insufficient capacity, so long as that determination is made on a nondiscriminatory basis.

10. Although the plain language of the statute includes only one qualification, the Commission's interpretation reads another substantial qualification into it. Under the Commission's interpretation, Section 224(f)(2) would read as follows:

> Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity, **and the utility cannot reasonably modify its facility to increase such capacity**, and for reasons of safety, reliability and generally applicable engineering purposes.

If Congress had intended to qualify a utility's right to deny access in the manner suggested by the FCC, Congress would have drafted the statute to include such language.

11. Section 224(f)(2) manifests Congress's understanding that "a utility providing electric service" must be given wide latitude in making determinations about access to its infrastructure because of the nature and importance of the underlying service for which the infrastructure is used -- electric service. Congress intended to bestow on electric utilities the "right" to make this determination without having to justify a decision not to expand its capacity. Section 224(f)(2) reveals Congress's conclusion that the determination of whether sufficient capacity exists to accommodate access to a pole, duct, conduit or right-of-way must be left to the judgment of the electric utility, based on its assessment of whether access comports with safety, reliability and generally applicable engineering standards.

12. A second glaring fault in the Commission's logic is its attempt to expand the nondiscrimination principle in Section 224(f)(1) so that a telecommunications carrier requesting access is afforded the same infrastructure rights as a utility engaged in its core utility services. In fact, this interpretation of the nondiscriminatory access provision of Section 224(f)(1) conflicts with Congress's intent. Congress expressly addressed the issue of nondiscrimination with respect to a utility subsidiary that offers telecommunications or cable television services, by requiring that a utility treat that subsidiary in the same manner as it does other providers of such services. The Commission itself observed that "the